87-1932

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA ELECTRIC COMPANY,
Petitioner,

v.

CHARLES GUNBY, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Charles J. Bloom
(Counsel of Record)
Kenneth D. Kleinman
KLEINBARD, BELL & BRECKER
1900 Market Street, Suite 700
Philadelphia, PA 19103
(215) 568-2000

Counsel for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Whether a plaintiff who alleges intentional race discrimination may prevail at trial merely by casting doubt on his employer's expressed business judgment, without presenting any evidence that his employer was in fact motivated by an intent to discriminate on the basis of race?

2. Whether a private right of action for employment discrimination exists under 42 U.S.C. §1981?

PARTIES TO THE PROCEEDING

Petitioner is Pennsylvania Electric Company.[1] Respondent is Charles Gunby, Jr., an employee of Petitioner.

1. Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioner herein discloses that it is a subsidiary of General Public Utilities Corporation (GPU), a holding company registered under the Public Utility Holding Company Act of 1935. Petitioner is affiliated with the following other wholly-owned subsidiaries of GPU: Jersey Central Power & Light Company (JCP&L), Metropolitan Edison Company (Met-Ed), GPU Service Corporation (GPUSC), and GPU Nuclear Corporation (GPUNC). Petitioner, JCP&L and Met-Ed collectively own all of the common stock of Saxton Nuclear Experimental Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Pennsylvania Electric Company (hereinafter "Penelec" or "Petitioner") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on February 4, 1988.

CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit has been reported at 840 F.2d 1108 (3d Cir. 1988) and is included within the Appendix for Petitioner, commencing at page A-1. The Order of the Court of Appeals denying rehearing in banc on March 4, 1988, is included in the Appendix at page A-48. The Findings of Fact and Conclusions of Law and Order of the United States District Court for the Western District of Pennsylvania have not been reported and appear in the Appendix commencing at page A-33. The Orders of the District Court denying Penelec's Motion for Judgment Notwithstanding the Verdict, New Trial or Remittitur and Gunby's Motion to Reconsider Order of Relief are included in the Appendix at A-36-37. A prior Opinion and two orders of the United States District Court for the Western District of Pennsylvania denying Penelec's Motions for Summary Judgment appear at page A-38-45 of the Appendix and the Opinion is reported at 631 F.Supp. 782 (W.D. Pa. 1985).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1988 (A-46). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

> penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 29 U.S.C. §2000e-2(a)(1) ("Title VII"), provides,

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

STATEMENT OF THE CASE

Factual Background

Penelec is a public utility, engaged in the generation, transmission, distribution and sale of electric energy. Gunby, a black male, was hired by Penelec in October, 1973 as an Administrative Assistant-Personnel. (A-5). He then received several promotions to various non-managerial personnel positions, handling equal employment and affirmative action matters. (A-5). As of August, 1982, Gunby was a Staff Administrator-Human Resources. (*Id.*). Shortly thereafter, James Reesman, Penelec's Vice President of Human Resources, began the implementation of a two-stage reorganization of the Human Resources Department. (A-7).

The first phase of the reorganization was to create a Personnel section for the corporate staff and to appoint a Supervisor for that section. (*Id.*). Reesman determined that Gunby was the best candidate for this position after consulting with Gunby's superior, Richard Gallatin, Director of Labor Relations, and Oscar Zolbe, another Human Resources employee. (*Id.*). The decision was based both on Gunby's background, and his expressed desire to handle traditional personnel responsibilities.

(*Id.*). Gunby accepted the position, which was essentially a lateral transfer. (A-6).[2]

The second phase of the reorganization involved the creation of several other new positions within the Human Resources Department, including the position of Manager-Employment/Equal Employment Opportunity (EEO)/Affirmative Action (AA). (A-7). In November, 1982, Reesman decided to award the position to Frank Hager, a white male, rather than to Gunby. (A-6).[3] Reesman based his decision on his perception of Hager's strong managerial and problem-solving abilities, as evidenced by Hager's administration of the Accounting Department, Hager's role in overseeing a massive office reconstruction project, and Hager's creation of an affirmative action tracking system that was subsequently adopted through the entire GPU system. (A-8-9). Reesman also believed that Hager had demonstrated a deep commitment to affirmative action. (A-8). By contrast, although Gunby possessed the technical knowledge necessary for the position, he had virtually no managerial experience. (A-5). Gunby's previous performance evaluation, which was prepared by Gallatin in October, 1982, before Gallatin was even aware that a new Manager position would be created, criticized Gunby for his inability to adjust to a change in direction, his lack of leadership, and his below-average working relationships. (A-10). Reesman's decision to promote Hager and not Gunby forms the basis for this lawsuit.

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2. Prior to accepting this position, Gunby had complained to Penelec regarding his failure to receive a similar position in Altoona, that was awarded to a white employee in September, 1982. (A-6). The jury found that Gunby was not discriminated against with respect to the Altoona position. (*Id.*).

3. The court below neglected to mention that Reesman also considered, but rejected, another white male for the position, Oscar Zolbe. (Joint Appendix at 249).

The Proceedings Below

On December 17, 1984, Gunby filed suit under Title VII and 42 U.S.C. §1981, alleging that Penelec's failure to promote him constituted discrimination on the basis of his race. Although Penelec argued at trial that Gunby had not provided any evidence establishing a nexus between his race and the decision not to promote him to the Manager position, the jury found in favor of Gunby on his § 1981 claim, and awarded him $32,000 in back pay, and $15,000 for emotional distress. (A-12). Judge Bloch of the United States District Court for the Western District of Pennsylvania then issued Findings of Fact and Conclusions of Law, finding for Gunby on his Title VII claim, based on the *res judicata* effect of the jury verdict. (A-33-34). Judge Bloch determined, however, that the equities of the case did not require him to upgrade Gunby's title and position, nor to remove Gunby's performance evaluations from his personnel file. (A-34).

On appeal, the Third Circuit affirmed the jury verdict and lower court decision with respect to Penelec's liability under § 1981 and Title VII.[4] While recognizing that a court should focus on the ultimate issue of intentional discrimination once a case has been tried, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), the Court of Appeals analyzed Gunby's proof under the tripartite burdens established for discrimination actions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).[5]

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4. The court reversed the award for emotional distress, and vacated and remanded the district court's decision with regard to equitable relief. (A-31). Neither of these rulings are the subject of this Petition.

5. In these cases, this Court set forth the standard allocation of proof under Title VII disparate treatment cases:

Initially, the court found that Gunby had established a prima facie case that he was a member of a racial minority, that he was qualified for the Manager position, and that the position was given to a white employee. (A-14-15). The court further held that "there is no question that Penelec met its burden at the second stage of proof of establishing a legitimate business reason for its decision." (A-15). The court then turned to the third stage, proof of pretext and intentional discrimination.

In finding that there was sufficient evidence for the jury to find pretext, the court relied on its prior decision under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA"), in *Chippolini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987) ("Chippolini"). In *Chippolini*, the Third Circuit held that a plaintiff may establish pretext merely by casting doubt upon the truth or credibility of the employer's proferred reason, even "without presenting evidence specifically relating to age," *Chippolini*, 814 F.2d at 898. Adopting that standard in this case under Title VII and §1981, the court concluded that the jury could have found unlawful discrimination, by disbelieving Penelec's reasons for not awarding Gunby the promotion.

In upholding the jury verdict, the Third Circuit stated that the jury, unlike Penelec, could have found Gunby to be a "better manager" than Hager, based on a

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(Continued)

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-253 (quoting *McDonnell Douglas*, 411 U.S. at 802, 804).

comparison of their respective positions and performance evaluations prior to Hager's promotion (A-20). The court also discounted Gunby's October, 1982 negative performance evaluation, finding that it could have been a "sham", (A-16-17), despite the express findings of the district court that the evaluation was non-discriminatory. (A-34). The Third Circuit failed to note that the record was devoid of any direct or indirect evidence of intentional race discrimination. Consequently, the court held that the jury verdict should be affirmed simply because the jury could have concluded that Penelec's "proffered reason rang false". (A-18).

REASONS FOR GRANTING THE WRIT

This case involves the proper application of the *Burdine* pretext standard that the Third Circuit has repeatedly held, in conflict with the decisions of this Court and the decisions of virtually every other court of appeals, requires a plaintiff only to "cast doubt" on the employer's proffered reason, without presenting any evidence of a nexus between the employee's race, age or other protected status and the employment decision. Thus, the issue presented here is identical to the issue presented in another Third Circuit case this Court recently agreed to consider, *Brieck v. Harbison-Walker Refractories, Div. of Dresser Industries, Inc.*, 822 F.2d 52 (3d Cir. 1987), *cert. granted*, 108 S.Ct. 1218 (March 21, 1988) (No. 87-271) ("Brieck").

The Third Circuit here and in *Brieck* has allowed the finder of fact to second-guess the business judgment of the employer, despite this Court's admonition that Title VII may not be used as a vehicle to overturn managerial decision-making authority. *United Steelworkers of America v. Weber*, 442 U.S. 193, 207 (1979). Under the Third Circuit's reasoning, if an employer does nothing more than mistakenly rely on what is found to be an erroneous perception of the facts, despite the lack

of any evidence of intentional discrimination based on race, the employee is entitled to prevail. This interpretation conflicts directly with the holding of the Court in *Burdine*, and decisions of the First, Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits. Moreover, by permitting the burden of proof of pretext to be met merely by challenging the employer's credibility, even without regard to the accuracy of the facts underlying the employer's perception, and without any affirmative evidence of unlawful discrimination, the Third Circuit has effectively shifted the burden of persuasion to the employer to prove that it did *not* act with discriminatory intent. Because such a holding is at odds with the decisions of other courts of appeals, as well as the established precedent of the Court, certiorari is appropriate.[6]

Certiorari should also be granted in light of the Court's recent request for reargument on the question whether the interpretation of 42 U.S.C. § 1981 adopted in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered. *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S.Ct. 65 (October 5, 1987) (No. 87-107), *reargument requested*, 108 S.Ct. 1419 (April 25, 1988). If the Court determines either that 42 U.S.C. § 1981 does not provide a private right of action, or that such an action should be limited in scope, its decision would necessarily have an impact on the jury verdict under § 1981 in this case. Therefore, certiorari is appropriate here to consider the proper scope of 42 U.S.C. § 1981.[7]

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6. In the alternative, Petitioner respectfully requests that this Court defer consideration of this Petition pending its decision in *Brieck*.

7. In the alternative, Penelec respectfully requests that this Court defer consideration of this Petition, pending its decision in *Patterson*.

A. The Third Circuit Decision that a Jury May Find Pretext Simply by Disagreeing with an Employer's Proffered Reason, Without any Evidence of Intentional Race Discrimination, is in Conflict With the Decisions of this Court and Other Courts of Appeals.

This case presents another example of the Third Circuit's fundamentally flawed interpretation of *Burdine*, first announced in *Chippolini*, and reiterated in *Brieck*. In *Burdine*, this Court held that pretext may be established by a plaintiff if he proves "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," 450 U.S. at 253. In assessing this burden of proving pretext, the Court held that the plaintiff may succeed "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. The Third Circuit here, as in *Brieck*, interpreted this language to permit an employee to prevail simply by questioning either the accuracy of the reason proffered by the employer for its action, or, notwithstanding the factual accuracy of the reason given, the credibility of the employer, with no direct or indirect evidence of discrimination, thereby ignoring the plaintiff's "ultimate burden of persuading the court that [s]he has been the victim of intentional discrimination", *Id.*; *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 716. Such an interpretation is contrary to the reasoning of *Burdine*, and numerous decisions of other courts of appeals. Because this Court has agreed to consider the identical issue in the ADEA context in *Brieck*, certiorari is appropriate here to resolve this conflict over a fundamental principle of discrimination law under § 1981 and Title VII.

1. The Decision Below Conflicts with this Court's Admonition that the Civil Rights Laws Should Not Diminish Traditional Management Prerogatives.

This Court has recognized that the laws prohibiting discrimination were "not intended to 'diminish traditional management prerogatives' ". *Burdine*, 450 U.S. at 259 (quoting *United Steelworkers of America v. Weber*, 443 U.S. at 207); *see also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("courts are generally less competent than employers to restructure business practices and unless mandated to do so by Congress, they should not attempt it."). Yet by construing the "unworthy of credence" language of *Burdine* to permit a plaintiff to prove intentional discrimination simply by presenting evidence that the employer's proffered reason was not factually accurate, the court below has invited juries and lower courts to assess whether they agree with the decision made, and to label any disagreement as discrimination. Vesting such unbridled discretion in the finder of fact is particularly troublesome here, where the management decision turned on the intangible and ineluctably subjective factors involved in evaluations of high-level management personnel.

The opinion of the Third Circuit, which is totally silent as to any evidence of race discrimination, is instead replete with references to an assessment of the accuracy of management's decision. Rather than examining management's actual motivation, the court held that "the jury could have determined that Gunby was the better manager, even though Hager might have been the better administrator." (A-20). This conclusion was based on the court's independent review of the two individual's prior responsibilities (". . . Gunby would seem to have been at least as qualified in overall planning and execution as Hager," (A-19)), a disparagement of Hager's accomplishments ("the jury could have concluded that managing an office reconstruction project is

not like managing subordinate personnel," *Id.*), an unrealistic view of Gunby's credentials (Gunby's "management skills" could be inferred from his position in corporate personnel, *id.*, even though "this position did not carry significant managerial responsibility or authority" (A-5)), and even dictionary definitions of "administration" and "management". (A-19-20). Even assuming, *arguendo*, that the court's findings were supported in the record, which Penelec disputes, they amount to no more than a decision by the jury that it would have selected Gunby, not Hager, for the Manager position. Aside from the fact that Penelec Vice President of Human Resources James Reesman was both better qualified and entitled to make this judgment, even if Reesman were mistaken in his assessment of Hager and Gunby, there was no evidence that his decision was motivated by intentional race discrimination.

In focusing on the accuracy of Penelec's judgment, rather than upon Penelec's alleged discriminatory intent, the court below relied upon the same erroneous interpretation of *Burdine* that it utilized in *Brieck*. In *Brieck*, the court held that summary judgment in favor of the employer was inappropriate because a factual dispute over the relative qualifications of a younger employee who was retained and an older employee who was laid off, was sufficient to raise an issue of age discrimination. This court granted certiorari in *Brieck* to consider whether an employee may prevail merely by questioning his employer's business judgment without providing any evidence of an intent to discriminate. *Brieck* Petition for Certiorari at (i). Similarly here, the question has been presented whether a jury can find intentional discrimination merely by disagreeing with the employer's assessment of the relative qualifications of two candidates for promotion.[8]

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8. Although *Brieck* was decided on summary judgment, while this case involves a jury verdict, the question of the type and

The seven other courts of appeals which have considered the pretext issue posed here have uniformly adopted the principle that it is not sufficient for a plaintiff simply to dispute the facts underlying an employer's proffered business reason, without adducing some evidence of discrimination. *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987) (in affirming summary judgment in favor of the employer in a Title VII and §1981 failure to promote case, the court held that merely disputing the facts underlying the employer's proffered reason was insufficient; "a plaintiff must take the extra step of presenting evidence to show that the reasons given are an attempt to cover up the employer's alleged real discriminatory motive."); *Goldberg v. B. Green & Co.*, 836 F.2d 845 (4th Cir. 1988) (summary judgment appropriate under ADEA where plaintiff contended decision to discharge him was erroneous; plaintiff "cannot avoid summary judgment in this case simply by refuting Green's non-age related reasons for firing him" because plaintiff failed to show an intent to discriminate); *McDaniel v. Temple Independent School District*, 770 F.2d 1340 (5th Cir. 1985) (judgment in favor of employer after Title VII trial affirmed; held, it is insufficient merely to prove that the employer's decision was incorrect); *Peters v. Lieuallen*, 746 F.2d 1390 (9th Cir. 1984) (lower court's findings for employer after Title VII and §1981 trial affirmed; held, the fact that an employer may have misjudged an applicant's qualifications was insufficient to establish violation); *Clark v. Huntsville City Board of Education*, 717 F.2d 525 (11th Cir. 1983) (judgment in favor of employee on Title VII promotion claim reversed on the grounds that disagreement over qualifications did not constitute race discrimination).

(Continued)

quantum of proof necessary to establish intentional discrimination is the same. In both cases, the Third Circuit relied on its prior opinion in *Chippolini*, as well as its analysis of *Burdine*.

In reversing a district court judgment in favor of an employee under Title VII and §1981, the Seventh Circuit recently stated,

> It is easy to confuse "pretext for discrimination" with "pretext" in the more common sense (meaning any fabricated explanation for an action) and to confound even this watery use of "pretext" with a mistake or irregularity. That is what happened here. The district judge did not conclude that Rea had advanced a "pretext for discrimination"; the court found instead that Rea did not have good cause to fire Pollard. Such a finding does not show pretext in any use of that term, which requires hiding the truth. If you honestly explain the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a "pretext".

Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir.) *cert. denied*, 108 S.Ct. 488 (1987). Similarly, in *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251 (1st Cir. 1986), the First Circuit upheld a directed verdict in favor of an employer under the ADEA, finding that "it is not enough for the plaintiff to show that the employer made an unwise business decision or an unnecessary personnel move. Nor is it enough to show that the employer acted arbitrarily or with ill will. These facts, even if demonstrated, do not show that *age* was a motivating factor," 792 F.2d at 255.[9]

The Third Circuit's opinion is flatly inconsistent with these decisions, as well as the holding of this Court in *Burdine* and *McDonnell Douglas* that a plaintiff must prove that the employer's proferred reasons were a

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9. Significantly, the First Circuit cited the district court's decision in *Chippolini v. Spencer Gifts*, 613 F.Supp. 1156 (D.N.J. 1985), in support of its findings. The Third Circuit has used the reversal of this *Chippolini* decision as the basis for its decisions in this case and in *Brieck*.

"pretext *for discrimination*". The court below has effectively redacted from discrimination law any requirement of evidence of unlawful discrimination; instead, a jury or court may find a violation simply because it believes the employer to be wrong. Because the decision below is thus at odds with decisions of this Court and those of numerous courts of appeals, and impermissibly interferes with management prerogatives, review should be granted.

2. The Court Below Effectively Placed the Burden of Proving a Lack of Discrimination Upon the Employer, in Contravention of *Burdine* and *McDonnell Douglas*.

A second well-established principle of discrimination law effectively rejected by the court below is that the ultimate burden of proving intentional discrimination remains at all times with the plaintiff. *Burdine*, 450 U.S. at 253. This Court has repeatedly emphasized that the employer need not shoulder the virtually impossible burden of proving "absence of discriminatory motive". *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978); *see also United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 716 (citing *Burdine*). By permitting a finding of intentional discrimination based solely on a challenge to the employer's credibility, without any evidence of discriminatory motivation, the Third Circuit has effectively shifted the burden of proving a lack of discrimination to the employer, in contravention of this Court's precedent, as well as decisions of other courts of appeals.

The court below found that the jury could have inferred intentional discrimination by disbelieving Reesman's explanation that he selected Hager due to his superior management and problem-solving ability. The court stated that such a credibility finding could be

based on a belief that Gunby's October, 1982 performance evaluation was a sham, (A-16-17), despite the district court's express finding that this evaluation was non-discriminatory. (A-34).[10] The court below also held that the credibility finding could be supported by a comparison of Hager's and Gunby's performance evaluations (A-9-10), despite the uncontradicted evidence in the record that Reesman did not review Hager's evaluations in making his decision. (Joint Appendix at 259). More importantly, because no evidence was presented to link Gunby's failure to receive a promotion to his race, the Third Circuit permitted a credibility determination, standing alone, to substitute for a finding of intentional discrimination. As a result, the court accepted as conclusive evidence of race discrimination the simple disbelief of the employer's proffered reason.

In *Martin v. Citibank, N.A.*, 762 F.2d 212 (2d Cir. 1985), the Second Circuit reversed a jury award in favor of a black employee under §1981, on the ground that the plaintiff had presented no direct evidence from which race discrimination could be inferred. In holding that the employee's denials of the employer's explanation were not sufficient to avoid a directed verdict, the Court cited Professors Wright and Miller: "If all of the witnesses deny that any event essential to plaintiff's case occurred, he cannot get to the jury simply because the jury might disbelieve these denials. There must be some affirmative evidence that the event occurred." 762 F.2d at 217-8 (quoting 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2527, at 563 (1971)). The failure

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10. In relying on the alleged impropriety of this evaluation as a prop for its affirmance of the jury verdict, the Third Circuit totally ignored the district court's findings that the evaluation was proper. Accordingly, the court below failed to follow the dictates of Fed. R. Civ. P. 52(a), and the mandate of this Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), that a district court's findings may be overturned only if they are specifically found to be clearly erroneous.

of the Third Circuit to recognize this principle effectively shifts the burden of persuasion to the employer to prove a lack of discrimination.

In holding that the mere denial of the employer's testimony, without any evidence of unlawful intent, cannot suffice to sustain a verdict under Title VII, the First Circuit, in *White v. Vathally*, 732 F.2d 1037 (1st Cir.) *cert. denied*, 469 U.S. 933 (1984), specifically rejected the contrary reasoning adopted by the Third Circuit. In that case, the First Circuit affirmed the judgment of the lower court that a female plaintiff had failed to prove she was discriminatorily denied a promotion on the basis of her sex. The court analyzed the plaintiff's failure of proof by stating:

> Thus, although the plaintiff may show pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence," [*Burdine*, 450 U.S. at 256], such a showing does not relieve the plaintiff of the burden of persuasion on the ultimate issue of discriminatory intent. *Id.* Merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent, for "[t]he defendant need not persuade the court that it was actually motivated by the proferred reasons" in the first place. *Id.* at 254, 101 S.Ct at 1094. To hold otherwise would impose on the defendant an almost impossible burden of proving "absence of discriminatory motive," *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 . . . and would improperly revive the presumption in plaintiff's favor which was raised by the *prima facie* showing but "dispel[led]" by the defendant's articulation of reasons, *Furnco*, 438 U.S. at 578 . . . . Moreover, any

> requirement that a defendant prove by a preponderance of the evidence that it in fact relied on its proferred reasons would vitiate the function of the pretext showing in the *McDonnell Douglas* analytical scheme, *Sweeney*, 439 U.S. at 24-25 n.1. . . .

732 F.2d at 1043.

The Eleventh Circuit has similarly held that "a simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability." *Clark v. Huntsville City Board of Education*, 717 F.2d at 529. The Third Circuit's contrary holding, as expressed in *Chippolini*, *Brieck* and this case, means that an employer who acts for other than the proffered justification, simply out of "ill-will, nepotism, or unpublicized financial problems," will be held liable for discrimination, even without evidence of discriminatory animus. *See Chippolini*, 814 F.2d at 903 (Hunter, J., dissenting) (arguing that the majority opinion in *Chippolini* improperly places the burden of persuasion on the defendant, and improperly permits a finding of intentional discrimination based solely on a challenge to the employer's credibility).

The Third Circuit's opinions in this case, *Chippolini* and *Brieck*, miscomprehend the distinction between direct and indirect evidence of discriminatory intent set forth in *Burdine*, by assuming that indirect evidence simply means a challenge to the employer's justification for its actions. Holdings of this Court, however, lead to the conclusion that even indirect evidence must have some nexus to discrimination in light of the plaintiff's ultimate burden. In *McDonnell Douglas*, this Court offered examples of such evidence: (1) the treatment of white employees relative to the treatment of the plaintiff; (2) the employer's reaction to the plaintiff's civil rights activities; (3) the employer's general policy and practice with respect to minority employment; and (4) statistics

as to the employer's employment policy, 411 U.S. at 804-5. Thus, while such evidence does not ". . . relate *directly* to the state of mind of the employer in the *specific* employment decision affecting the plaintiff[, it does] however, relate to *other* race-conscious conduct of the employer, which could reasonably suggest to the finder of fact that the race consciousness influenced the employment decision at issue in the litigation." Milone, *Age Discrimination: Proving Pretext under the ADEA*, 13 Emp. Rel. L.J. 104, 116 (1987). *See, e.g., Krodel v. Young*, 748 F.2d 701, 706 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985) (pretext may be proven by establishing that the employer's explanation was a sham *and* by offering additional circumstantial evidence of age discrimination).

Based on the Third Circuit's repeated failure to recognize the fundamental principles of discrimination law established by this Court in *McDonnell Douglas* and *Burdine*, and accepted by the other courts of appeals, review is appropriate to resolve the issue of the type and quantum of proof necessary to establish intentional discrimination, as interpreted by the court below.

C. The Third Circuit's Decision Erroneously Assumed, Without Discussion, that a Cause of Action Exists Against Private Employers under 42 U.S.C. §1981.

Petitioner did not explicitly argue below that no cause of action exists against private employers under 42 U.S.C. § 1981, because the law on this question appeared to be well-settled. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Recently, however, this Court requested briefs and arguments on whether *Runyon v. McCrary* was properly decided. *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S.Ct. 65 (October 5, 1987) (No. 87-107), *reargument requested*, 108 S.Ct. 1419 (April 25, 1988).

Accordingly, the vitality of a private right of action under §1981 is in doubt.

Five Justices since 1968 have acknowledged that the decision to extend the Civil Rights Act of 1866 to private actions was "almost surely wrong". *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 450 (1968) (Harlan J., White, J., dissenting) (interpreting the scope of 42 U.S.C. § 1982); *see also Runyon v. McCrary*, 427 U.S. at 186, 189, 192 (Powell, J., concurring) (Stevens, J concurring) (White, J., Rehnquist, J., dissenting). Indeed, Justice Stevens has remarked that the construction of §1981 adopted by the Court "would have amazed the legislators who voted for it." *Id.* at 189 (Stevens, J., concurring). In their dissent in *Runyon*, Justices White and Rehnquist forcefully argued that §1981 should not have been construed to cover purely private acts of discrimination for the first time over one hundred years after its passage, especially in light of the opposite construction given the statute by the Court in the *Civil Rights Cases*, 109 U.S. 8 (1883), less than two decades after its enactment. The dissenting Justices also pointed out that §1981 derived from §1977 of the Revised Statutes of 1874, which in turn reenacted §16 of the Voting Rights Act of 1870, 16 Stat. 144, and which was based on the Fourteenth Amendment to the United States Constitution. *Runyon*, 427 U.S. at 195-206. Because the Fourteenth Amendment protects individuals only from the denial of equal protection of the laws, §1981 should have been construed only to preclude statutory and common law from disabling an individual's capacity to contract, not to require private individuals to contract with one another, without regard to race. *Id.*

After *Runyon*, a unanimous Court acknowledged that § 1981 was derived from the Fourteenth Amendment, in *General Building Contractors Assoc. v. Pennsylvania*, 458 U.S. 375 (1982). In reaching its decision, the Court noted:

> The 1870 Act, which contained the language that now appears in §1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between those Acts and the Amendment, it would be incongruous to construe the principal object of their successor, §1981, in a manner markedly different from that of the Amendment itself.

458 U.S. at 389-390. It would be equally incongruous here to construe §1981 to prohibit private acts of discrimination, when its progenitor, the Fourteenth Amendment, does not.

A substantial question thus exists whether §1981 was properly construed to cover private acts of discrimination in *Runyon*. Although this issue was not explicitly addressed before the court below, Petitioner raised the issue implicitly by challenging the applicability of §1981 to the facts proven. In any event, the Court may exercise its discretion to consider issues not raised explicitly in the courts below where the determination of such an issue constitutes "plain error" in an "exceptional case". *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947).

The question of the existence of a private right of action against employers under § 1981 is fundamental to the instant case, in light of the jury verdict pursuant to §1981 in favor of Gunby, which the District Court found to be *res judicata* with respect to Gunby's Title VII claim (A-42). Moreover, this issue is of substantial public importance due to the broad range of cases currently being litigated under §1981. Accordingly, Penelec respectfully requests that the parties be permitted to bring this issue before the Court. Because Penelec can demonstrate that no such private right of action exists, this Court should grant the instant Petition and, upon review, reverse the decision of the Third Circuit below.

CONCLUSION

For the foregoing reasons, Petitioner Pennsylvania Electric Company respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted.

Charles J. Bloom, Esquire
Kenneth D. Kleinman, Esquire

KLEINBARD, BELL & BRECKER
1900 Market Street, Suite 700
Philadelphia, PA 19103

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3707. 86-3723

CHARLES GUNBY, JR.
Appellant in 86-3707

v.

PENNSYLVANIA ELECTRIC COMPANY,
Appellant in 86-3723

On Appeal From the United Sates District
Court for the Western District
of Pennsylvania
(D.C. Civil No. 84-3009)

Argued July 6, 1987

Before: HIGGINBOTHAM, BECKER,
Circuit Judges, and
BARRY, District Judge*

(Filed February 4, 1988)

STANLEY M. STEIN (Argued)
Feldstein Grinberg Stein & McKee
428 Boulevard of Allies
Pittsburgh, PA 15219

Attorney for Appellant/
Cross-Appellee

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* Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

ANTHONY DE SABATO (Argued)
CHARLES J. BLOOM
L. OLIVER FREY
Kleinbard, Bell & Brecker
1500 United Engineers Building
30 South 17th Street
Philadelphia, PA 19103

Attorneys for Appellee/
Cross-Appellant

OPINION OF THE COURT

BECKER, Circuit Judge.

These are appeals from a jury verdict in favor of the plaintiff Charles Gunby in a race discrimination in employment case brought under 42 U.S.C. §1981 and from the decree of the district court in a companion suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.* The jury awarded Gunby $22,000 [sic] in back pay and $15,000 for emotional distress against his employer Pennsylvania Electric Company ("Penelectric"), on account of its failure to promote Gunby to another position. The district court determined that the jury verdict precluded its determination of the Title VII claim and enjoined Penelectric from further discrimination against Gunby because of his race. The court declined, however, to upgrade Gunby's grade level position or to grant him an equivalent equitable remedy. Penelectric challenges the sufficiency of evidence to support the jury's verdict on both liability and damages. Gunby, in his cross-appeal, challenges the adequacy of the equitable relief awarded by the district court's disposition of the Title VII claim.

As to the §1981 claim, we make three determinations. First, our review of the evidence persuades us that, although Penelectric mounted a strong defense,

the jury heard sufficient evidence to have found by a preponderance of the evidence that Penelectric intentionally discriminated against Gunby. Second, we likewise conclude that the jury's back pay award must be sustained, because sufficient evidence existed for the jury reasonably to have determined the salary that Gunby would have received had Penelectric granted him the promotion at issue. Third, because there is no specific evidence that Gunby suffered an adverse reaction to Penelectric's failure to promote him to the position at issue in this lawsuit, there is an insufficient basis to sustain the jury's award for emotional distress. We reject the notion that damages may be presumed in such cases, and the inference that Penelectric's passing Gunby over *must* have had an adverse affect [sic] will not suffice. Accordingly, we must set aside the award for emotional distress.

Finally, we conclude that the district court erred in refusing to order any effective remedy for Gunby under Title VII. The Title VII verdict in Gunby's favor required a "make whole" remedy and the district court's order, which merely directed Penelectric to cease discrimination against him on account of his race, provided no such remedy. Because of the record's inadequacy on the issue of the relationship between grade level position and salary under Penelectric's personnel structure, we concede that it would have been difficult to know just how to fashion a remedy. However, neither the lacuna in the record nor the district court's broad equitable discretion in such matters justifies the absence of a meaningful remedy. Hence we reverse and remand, not only for further findings and concomitant equitable relief but also for possible development of the record on this point. The judgment of the district court will therefore be

affirmed in part and reversed in part, and the case will be remanded for further proceedings consistent with this opinion.[1]

I. INTENTIONAL RACE DISCRIMINATION

A. The Facts of Record

Gunby, who has a Bachelor of Arts degree in psychology from the University of Pittsburgh and a Master of Arts degree in industrial relations from St. Francis College, has been employed by Penelectric's personnel operation since October 1973. Throughout his career at Penelectric, Gunby has been promoted steadily.[2] Additionally, at least until October 1982, Gunby received above average job performance evaluations.

This lawsuit centers on Penelectric's failure, in December 1982, to promote Gunby from his job as Supervisor — Division Personnel Services — Corporate to the position of Manager — Employment and Equal

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1. Penelectric has also asserted that Gunby's §1981 claim was time-barred. The claim concerns events that occurred in 1982. Gunby's complaint was filed in December 1984, outside the two year Pennsylvania statute of limitations applicable to §1981. Goodman v. Lukens Steel Company, 777 F.2d 113 (3d Cir. 1985), *aff'd*, 107 S.Ct. 2617 (1987). However, Al-Khazraji v. St. Francis College, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022 (1987), specifically holds that courts should not give retroactive effect to this shorter limitations period for §1981 actions that arose after 1977. We therefore reject the time bar claim, which was interposed as a good faith argument for a modification or reversal of existing law.

2. Gunby's first position with Penelectric was as Administrative Assistant — Personnel. In 1974 he was promoted to Administrative Assistant for Affirmative Action. In January 1976, Gunby was promoted to Director — Equal Employment & Affirmative Action. Penelectric promoted Gunby again in September 1979 to Equal Employment Opportunity and Affirmative Action — Manager. In August 1982, he was promoted to Staff Administrator — Human Resources, and in December 1982 transferred to Supervisor — Division Personnel Services — Corporate.

Employment Opportunity and Affirmative Action ("Manager — Employment/EEO/AA").[3] The circumstances of Gunby's lateral transfer to the Supervisor — Division Personnel Services — Corporate job and of Penelectric's failure to promote him to the Manager job are the sinews of this appeal, and we will detail them here.

As Director of EEO/AA from 1976 to 1979, Gunby had the responsibility for directing Penelectric's EEO/AA program. Penelectric is a large company, hence this was an important responsibility. However, this position did not carry significant managerial responsibility or authority. Although his title changed in 1979 to EEO/AA — Manager, no change in job duties occurred.[4] As a result of conversations with Richard Gallatin, Penelectric's Director of Labor Relations, Gunby was advised that his position in EEO/AA work would probably not lead to a managerial-level job at Penelectric. Gunby therefore made attempts to obtain jobs in other personnel departments so as to broaden his experience in personnel administration and make himself more "promotable".

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3. Penelectric's salary structure includes 26 grade levels. Higher grade levels reflect higher salaries, although salaries range so widely within each grade level that a salary at the high range of a low grade level may exceed a salary at the low range of a higher level. Gunby's Supervisor — Division Personnel Services — Corporate position was rated at grade level 16, and the Manager — Equal Employment Opportunity and Affirmative Action position was rated at grade level 20.

4. In August 1982, Gunby's title was changed again to Staff Administrator — Human Resources because Gunby complained that his equivalent job in Penelectric sister companies within the General Public Utility (GPU) system had been upgraded to grade level 17, but that he had not been similarly upgraded. Gallatin, after checking with the Wage and Salary Committee, represented that the failure to upgrade was an oversight and that they would make the adjustment at that time. In August 1982, when Gunby was upgraded to a grade level 17, his salary was $3,080 per month, which was 95% of the mid-point of the grade level.

When the position of Supervisor — Division Personnel Services — Corporate in Altoona, Pennsylvania, was posted, Gunby applied. However, Gunby did not receive an interview, and the position was filled in August or September 1982, by Gary Burkholder, a white accountant, formerly of the System Personnel Department's Compensation and Benefits Section, Wage and Salary Group. Burkholder had performed services of calculating pay raises based upon performance appraisals, but had had no experience in administering personnel benefits or in dealing with the other aspects of personnel administration.

When the Altoona job was filled by Burkholder, Gunby approached Gallatin, stating that he thought Burkholder was not qualified for the job, that he (Gunby) had been treated unfairly, and that he intended to contest Burkholder's qualifications for the job.[5] Shortly after making this complaint, Gunby was advised that a similar job had been created for him as Supervisor — Division Personnel Services — Corporate in Johnstown. At the time that Gunby was advised of this new position, he was told that his decision was needed immediately, and he accepted.

Gunby had not, however, been told that Penelectric had created the grade level 20 position of Manager — Employment/EEO/AA at the same time. Simultaneously with the announcement of the existence of this new position, James R. Reesman, Penelectric's Vice-President of Human Resources, announced that it would be filled by Frank Hager, another white male accountant who had no experience in personnel administration or EEO/AA. Hager had worked at all times in the Accounting Department as an accountant. Prior to December

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5. Gunby's complaint about the Altoona job was pressed in this lawsuit, but the jury found that he was not discriminated against with respect to the Altoona job.

1982, he was a Senior Staff Accountant and prior to that had been Assistant to the Comptroller.

The new level 20 position subsumed all of the responsibilities of Gunby's previously held EEO/AA functions. Under Penelectric's procedures, because the job was a grade level 20 job, it did not have to be posted. Gunby, therefore, had no opportunity to apply for it. Penelectric maintains that Gunby was not given the job because he did not possess the qualifications of strong leadership and managerial qualities required.

According to Penelectric, the new position arose out of a two-stage reorganization of the Human Resources Department. The first phase was designed to create a personnel section for the corporate staff and to appoint a supervisor for that section. In doing so, Reesman consulted with Gallatin, Gunby's direct superior, and Oscar Zolbe, another senior Human Resources employee, to determine the best candidate for the new supervisor position. They agreed on Gunby, based on Gunby's background and his expressed desire to leave the EEO/AA area for more traditional personnel work. To deal with the technical demotion to grade 16 that would accompany the job, Reesman ordered that Gunby's pay not be reduced if Gunby accepted the position. The second phase of the reorganization was said to involve creation of several new positions and selection of persons to occupy them. The positions of Director of Personnel Services and Manager — Employment/EEO/AA were added to the Human Resources Department, the latter being the focus of this appeal.

Reesman made the decision to give the Manager — Education [sic]/EEO/AA job to Hager.[6] According to

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6. Penelectric also adduced evidence that Reesman's decisions were not racially motivated because: (1) he pioneered Penelectric's EEO/AA programs; (2) under his auspices, Gunby was hired to work in this area; (3) and when, in 1980, a merger of Penelectric and Metropolitan Edison Company was contemplated and Reesman was to be Vice-President of Human Resources after the merger, he

Penelectric, Reesman believed that Hager possessed managerial ability, was results-oriented, was aggressive and could get the job done, and also that Hager "had shown a deep commitment to EEO and Affirmative Action." Hager, on the other hand, was "shocked" to get the job, and was not expecting to get a job in the employment area.

The record as to Hager's background is somewhat opaque, at least with respect to managerial responsibilities.[7] Hager was a senior staff accountant in which position he apparently had the duty of "administration" of the 185-person accounting department. J.A. at 155. Although these duties were described as having some relationship to personnel, Hager testified that he had performed these duties when he was assistant to the Comptroller, so the jury could have concluded that they did not involve supervision of personnel. Hager only supervised two people — a word processing operator and an accountant, although when the Comptroller was absent he filled in for him and had additional responsibility.

In 1979, while Hager was still in the accounting department, he established a tracking system for monitoring affirmative action goals and timetables in that department. This monitoring system, consisting of a color-coded flow chart, was presented to Penelectric's President, who directed that it be used throughout the company. The Hager system was so well received that the entire General Public Utilities system of which Penelectric is a subsidiary later adopted it. In 1982,

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(Continued)

prepared a reorganization plan for the to-be-created Human Resources Department, which designated James Rudolph, a black male, as Manager — Employment and EEO/AA.

7. Hager's entire background was in accounting. Prior to joining Penelectric, Hager had worked for a certified public accountants' firm in New York City and for Jersey Central Power & Light, where he worked on SEC regulations.

Hager was in charge of a three-million dollar construction program to refurbish Penelectric's offices. His success in these projects appears to be the key prop in Penelectric's case for Hager's superior managerial skill.

Gunby, however, adduced strongly countervailing evidence concerning his and Hager's relative capabilities. Gunby and other Penelectric employees were subject to the Hay System of performance evaluation which rates an employee's performance in 18 categories on a scale from 1, for marginal employee, through 9, a distinguished employee. Gunby was rated at least annually by Richard Gallatin. The performance evaluations were tied directly to salary increases and were reviewed by Gallatin's superior, James R. Reesman, Vice President of Human Resources. These ratings do more than serve to compare the two men; they furnish positive evidence that Gunby possessed managerial skills, for many of the categories implicate managerial ability.

Hager was evaluated under the Hay System in December of 1981 as having a score of 4, or low competent, for the category of planning and organization. In contrast, Gallatin had rated Gunby as a 7, or commendable. By March 1982, the date of Hager's last evaluation prior to the job offer, he was still only a 5 in that category. Under the heading of analytical ability, where Hager was rated a 5, Gunby was rated a 7. Under initiative and self-motivation, where Hager was rated a 6, Gunby was rated a 7. The overall evaluation of Gunby for November 1981 showed that Gunby had six 7's (commendable), eleven 6's (highly competent), one 5 and no 4's. His average rating was 6.

In the evaluation of March 1982, although both Gunby and Hager were rated as overall 6's, Hager had no 7's at all. With one exception (a 5, or competent, for "creativity"), all of Gunby's evaluations were 6's or 7's for an overall evaluation of a 6 (high competent). Moreover, Hager had suffered a significant reduction in evaluation

between December 1981 and March 1982, when he had received no 7's at all and seven 5's.

Penelectric stressed Gunby's October 1982 evaluation, which gave consideration to job management and working relationship criteria. With respect to planning and organization, Gallatin rated Gunby a 2 (below average) with a written comment that Gunby "[h]as had difficulty adjusting to a change in direction, i.e.: when a report on EEO activity for each office was needed." J.A. at 374. Gunby's rating for decision making and delegation, the other two management categories, were low average, 3's. With respect to working relationships, Gallatin rated Gunby a 2 (below average) on leadership with a written comment that Gunby "has had problems persuading others to provide data and information in a timely, accurate fashion." On the other factors bearing on working relationships, Gunby scored below average. J.A. at 374. Gunby pointed out, however, that this rating was made *after* his complaint about the Altoona job. He submits therefore that it is suspect.[8]

Gunby contended that the position description for the Manager — Employment/EEO/AA job indicated that much if not most of the new job's responsibilities were responsibilities that he already had. The first element of the Manager — Employment/EEO/AA job description, the "accountability objective," states that "[t]his position is accountable for providing management direction in the areas of Affirmative Action and an Equal Employment Program, employment policy, professional recruitment . . . and personnel administration of various employee benefit programs. . . ." J.A. at 337. The new position's job description is heavily the type Gunby had been carrying on before:

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8. It is noteworthy that the October 1982 ratings were Gunby's only poor ratings with Penelectric. Even Gunby's early performance evaluations were consistently above average, including mostly 4's and 5's and sometimes 6's and 7's.

The [Manager — Employment/EEO/AA] is responsible for insuring that overall policy direction and operational coordination are integrated with corporate employment, equal employment opportunity and affirmative action goals and objectives and with the overall needs of the Company.

. . .

This position is responsible for assuring that the Company's employment and personnel policies, standards and practices are non-discriminatory.

. . .

This position is responsible for developing, implementing and monitoring the Company's Affirmative Action Program.

. . .

The incumbent provides interpretation and advice to assure consistent application of policy in the area of Equal Employment Opportunity and Affirmative Action. This includes reviewing and recommending appropriate modification of Company policies to insure that they are in compliance with EEO/AA laws.

This position must represent the Company tactfully, timely and effectively with the Office of Federal Contract Compliance; answering inquiries, forwarding documents or information and attending meetings when necessary. When these reviews uncover areas of concern, the incumbent formulates appropriate corrective action.

This position must establish relationships with minority oriented civic and business groups, recruit at minority colleges, [and] advertise in minority periodicals in order to insure that the Company is operating within the spirit of the Affirmative Action Program.

J.A. at 337-39.

Additionally, Gunby adduced evidence that Reesman could have been untruthful in his testimony. Reesman had claimed that an Affirmative Action Plan and Tracking System developed by Gunby was not approved by the federal government. However, Gunby's November 1981 performance evaluation, which Reesman had personally reviewed, showed not only that Gunby had prepared such a plan and that it had been approved by the federal government, but also that Gunby had been praised for the preparation of the complicated statistics and documents.

The jury rejected Gunby's claim concerning the Altoona job, but found for Gunby on his claim that he was not given the position of Manager — Employment/EEO/AA because of his race. The jury awarded Gunby $33,000 back pay damages and $15,000 damages for emotional distress and humiliation. The district court then entered judgment on the Title VII claim, declined to upgrade Gunby's title and position and, as equitable relief, simply enjoined Penelectric from further discrimination. Gunby appealed from the court's Title VII orders, and Penelectric appealed the jury's verdict and failure of the court to grant a new trial or judgment notwithstanding the verdict.

B. Discussion

1. *Legal Standards*

The legal standards governing sufficiency of proof in §1981 and Title VII cases are well established and no purpose would be served in rescribing them here except in capsule form.[9]

In order to succeed, plaintiff must prove intentional discrimination by a preponderance of the evidence.

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9. In Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984), we held that the legal standards established in §1981 cases and Title VII cases are interchangeable.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Gunby first had the burden of proving a prima facie case of discrimination. To establish a prima facie case, Gunby had to prove (1) that he is a member of a racial minority; (2) that he was qualified for the job; and (3) that the job was given to a member of another race. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). Penelectric then was required to articulate a legitimate, nondiscriminatory reason for its actions. Finally, if Penelectric articulated a nondiscriminatory reason, Gunby had to prove that Penelectric's reason was a mere pretext for intentional race discrimination. *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986). At all points in the trial, Gunby retained the burden of proving that he would have received the position but for his race. *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915-16 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984).[10]

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10. We note that the Supreme Court stated in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), a case such as the one *sub judice* that had been tried on the merits, that courts should focus on the ultimate determination of discrimination rather than continue to engage in a *Burdine*-type burden shifting analysis. The Court stated that "it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*." *Id.* at 714 (footnote omitted).

This opinion reflects our cognizance that the ultimate question is whether Penelectric intentionally discriminated against Gunby in violation of Title VII. We have proceeded with a review of the burden shifting only because: (1) the language of burden shifting is so infused in Title VII jurisprudence that clarity may often be achieved by a consideration of such terms; (2) counsel have argued the case in burden shifting terms; and (3) one element of the final analysis, Gunby's qualification for the level 20 position, is an element of the prima facie case.

2. *Prima Facie Case and Nondiscriminatory Reason*

At the threshold, Penelectric contends that Gunby did not establish a prima facie case because his evidence does not support the conclusion that he was qualified for the level 20 Manager — Employment/EEO/AA position. The job description states that the position is accountable for "providing management direction" in a number of areas and gives the incumbent supervisory authority over senior and intermediate level administrators, and Reesman testified that it was essential to fill the position with someone who had strong managerial skills and a proven track record of strong management.

The record supports Gunby's contention that he had the experience to fully satisfy the job description, however. First, Gunby had already successfully performed all of the EEO/AA duties, which were a significant facet of the job. Focusing briefly on a few of the responsibilities of the position, he had prepared statistical background information and documentation for presentation to the Labor Department, work that Gallatin acknowledged was "complex and complicated," and he had educated Penelectric employees and the community on the principles and objectives of the AA program by holding training classes, by going out into the community surrounding Penelectric facilities and informing community groups and organizations about the company's program, and by recruiting minorities and women to apply for jobs at Penelectric. Further, he had engaged in recruiting at various college campuses and provided workshops and seminars on EEO/AA.

With his masters degree, Gunby more than sufficiently met the educational prerequisites for the position. Moreover, his prior training and experience provided him with the "detailed knowledge of equal employment opportunity/affirmative action laws and the ability to integrate Company needs and policies with

state and federal requirements to ensure that the Company's obligations in the employment and promotional opportunities areas are consistent with those laws." J.A. at 339. The job description further required the incumbent to "represent the company tactfully, timely and effectively with the Office of Federal Contract Compliance [OFCCP]," and Gunby had been praised on his November, 1981, evaluation for developing "a good relationship with OFCCP representative . . . during the on-site compliance review."

Turning to the question of managerial ability, Gunby's November 1981 employee performance evaluation, done by Gallatin, showed good marks in categories such as working relationships, professional attitudes, communications, determination, initiative and self-motivation, job knowledge and analytic ability, planning and organization, and especially leadership qualities. All of these matters implicate managerial ability. Gunby's steady increase in EEO/AA responsibility and success, culminating in the negotiation and acceptance by the OFCCP of the company's affirmative action plan in 1981, coupled with Penelectric's appointment of Gunby in December 1982 to the management of all personnel benefits for 750 corporate officers and employees, tends to demonstrate that he possessed managerial capability. Gunby testified that his managerial ability had been complimented by his supervisors, and neither Reesman nor Gallatin testified that they had ever criticized Gunby's management ability prior to trial.

For the foregoing reasons, we conclude that Gunby demonstrated his ability to perform the job in question, hence established a prima facie case. There is no question that Penelectric met its burden, at the second stage of the proof of establishing a legitimate business reason for its decision; the facts favoring Penelectric described above suffice in this regard. Therefore, we turn to the question whether Gunby met his burden of establishing

that Penelectric's justification was a pretext or sham.[11]

3. *Proof of Pretext and Intentional Discrimination*

In *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir. 1987) (in banc) we established that

> plaintiff's ultimate burden of persuasion includes the requirement to show that the defendant's proffered reason is a pretext for discrimination, i.e., that the proffered reason is merely a fabricated justification for discriminatory conduct. *Burdine*, 450 U.S. at 257 . . . The plaintiff may meet this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence.*" Id. at 256 (emphasis added).

Because the only "black mark" on Gunby's employment record is the October 1982 performance evaluation, a threshold issue is whether the jury could conclude that the performance evaluation was a sham. The October 1982 evaluation found Gunby unfit for a management position because he allegedly failed to perform certain unspecified assignments, and obviously that evaluation, if credited, would strongly support Penelectric's position.

However, this performance evaluation was prepared by Penelectric a month *after* Gunby had expressed his displeasure with the fact that Gary Burkholder had been given the Altoona job. Gunby complained that Burkholder, a white male employee from the accounting department, had been given a personnel job for which Gunby was qualified and had expressed a desire to be considered, but for which he was denied an interview.

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11. Our scope of review on this point is, of course, extremely deferential — whether there was sufficient evidence on which the jury could have rationally based a verdict.

Gunby's evaluation was completed in late October 1982, the same time that Reesman claims to have decided to give the level 20 managerial job to Hager. J.A. at 253, 373. Although Gallatin claimed that he had conversations with Gunby about Gunby's alleged failure to fulfill certain assignments and projects in 1980 and 1981, no criticism appears on any of Gunby's performance evaluations, including the November 1981 evaluation, until October 1982. J.A. at 212-19. Against the background of nine years of excellent performance and regular promotions, we believe that the jury could have concluded that Penelectric had a motive in October 1982, to evaluate Gunby's performance unfairly in order to justify the fact that it had appointed a white accountant with little prior experience in personnel administration and EEO/AA to a responsible management position in personnel for which Gunby was particularly qualified.

Another factor casts considerable doubt upon the October 1982 performance evaluation. The evaluation stated that Gunby caused his supervisor frustration because he failed to complete certain unspecified assignments. At about the same time, Gallatin considered Gunby a "natural" for the corporate personnel administration job which involved administration of personnel matters for 750 corporate employees a job not likely to be given to an employee who allegedly failed to complete assignments. J.A. at 201.

Given the facts set forth at considerable length above, we think that the jury could have concluded that Gunby was better qualified for the level 20 position than Hager and that Penelectric's alleged nondiscriminatory reasons for not promoting Gunby to the position were a sham. Gunby surely had had more education and job responsibility in the personnel and EEO/AA field than Hager. Indeed, from the position description the jury could reasonably have concluded that EEO/AA, the area of Gunby's expertise, was a principal responsibility of the level 20 job, and that that was an area in which Hager

had virtually no experience. The jury could further have concluded that the EEO/AA commitment ascribed by Penelectric to Hager could not properly be deduced from his production of an accountant's color-coded flow chart, however well done. There being no other evidence on the point, the jury might have thought that the claim of "commitment" was pretext.

The critical remaining issue is, of course, management skill. Reesman claimed that he was looking for someone with "proven" management capability — capability that Hager supposedly had, but Gunby did not. We think, however, that the jury could reasonably have concluded that this proffered reason rang false.

First, it is important to place the managerial question in perspective. The new Manager — Employment/EEO/AA position which Gunby claims he was denied because of his race only involved the direct supervision of four people. Second, a comparison between Gunby's November 1981 evaluation and Hager's November 1981 and March 1982 performance evaluations showed that, despite Penelectric's contention that Hager had done a good job with the refurbishment of the office, Hager's performance had been downgraded during the period of time he managed the refurbishment. He had not only been rated lower in March 1982 than he had been rated in November 1981, but he had been rated *significantly* lower than Gunby had been in the various performance categories. J.A. at 345-46; *compare* J.A. at 346 *with* J.A. at 353. Therefore, Penelectric's claim that Hager had done a superlative job and evidenced great managerial ability during the refurbishment project could have been rejected by the jury in light of the reduction in his performance evaluation between December 1981 and March 1982, the period covered by the planning of the refurbishment project.

Moreover, Hager's alleged managerial ability evidenced itself in a job in which his primary function was accounting — to make sure that the refurbishment

expenses remained within budget and that new office space was properly allocated among departments. The jury could have concluded that managing an office reconstruction project is *not* like managing subordinate personnel. Hager directly supervised only two people, one a word processing person. Moreover, there was no evidence that Hager ever exhibited any management capability in the field of personnel administration or EEO/AA, and Reesman's oral testimony that Hager, who had only been rated as a 4, low competent, in planning and organization possessed management skills was uncorroborated by any document. J.A. at 175.

Gunby's responsibilities and ratings, described at length, *supra* pp. 10-11, provide evidence from which the jury could have concluded that Gunby possessed management skills. Significant in the record is that he was awarded the corporate personnel administration job, which involved administration of personnel matters for 750 corporate employees. Although both Gunby and Hager had primarily been administrators, given their relative responsibilities Gunby would seem to have been at least as qualified in overall planning and execution as Hager.

To the extent that managerial and administrative functions differ, a manager must demonstrate a greater capacity for supervising the work of others and achieving stated goals.[12] The jury could have determined that

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12. We need not enter into a discourse about the difference between administration and management. The literature in the field is extensive and reflects no clear line. It is plain from the literature, however, that the work of administrators and managers overlaps considerably. *See, e.g.*, Turem, *The Call for a Management Stance*, Social Work, September, 1974 at 615: *Management may be defined as the purposive control and direction of resources to achieve stated goals*. This definition includes goal orientation and decision-making aimed at the goals.

Administration is often used synonymously with management, but this article will make a distinction. Administration is defined as the process of management. It provides the goals and techniques for

Gunby possessed sufficient management skills and that Hager's were predominantly administrative, and thus the jury could have determined that Gunby was the better manager, even though Hager might have been the better administrator. In our view, the jury was entitled, on the basis of the foregoing, to find Penelectric's claim that Gunby was much less qualified than Hager to be pretextual.

Other facts support Gunby's intentional discrimination showing. But above all, we think that there was evidence that would support a conclusion by the jury that the manner in which Penelectric dealt with Gunby commencing in September 1982, reflected a discriminatory stratagem. Given the evidence described above about the relative qualifications of Gunby and Hager for the level 20 position (including the evidence suggesting that the October 1982 performance evaluation may not have been above board) the jury might have concluded that offering Gunby the corporate level job and insisting on an immediate reply, and not announcing the level 20 management position until he had accepted the corporate level position was a strategy designed to keep a black man from obtaining the level 20 management position. We underscore that we do not declare that that is what happened. We do, however, believe that a jury could have so concluded from the evidence.

We held in *Chipollini* that a "plaintiff may meet [the burden of showing that the defendant's proffered reason was pretextual] 'either directly by persuading the court that a discriminatory reason more likely motivated the

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(Continued)

collecting necessary information and for controlling and enforcing decisions about how to allocate resources.

See also Roberts' Dictionary of Industrial Relations, Third Edition, at 407:

> Managerial employee. Employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."

employer's proffered explanation is unworthy of credence.' " [sic] 814 F.2d at 898 (quoting *Burdine*, 450 U.S. at 247). Viewing the facts in the light most favorable to the plaintiff, as we must, we conclude that these burdens have been met here, and, further, that the jury could have found that Gunby met his burden of showing that, "but for" his race, he would have received the position. *See Lewis v. University of Pittsburgh*, 725 F.2d at 914.

II. SUFFICIENCY OF EVIDENCE OF BACK PAY

A. The Facts of Record

The record contains information relating to Gunby's and Hager's salary levels from the date of the discriminatory conduct to the date of trial. In addition, the record contains documents showing the high-, low-, and mid-point salary levels for all job levels (including levels 16 through 20) for all years from 1980 to the date of trial (1986) and showing that Gunby's salary level at the time of the discriminatory conduct was as at the mid-point of his salary range.

The relevant time period for consideration of this issue is December 1, 1982, the date of the conduct found to be discriminatory, to October 27, 1986, the date of the jury verdict.[13] Also relevant to the back pay determina-

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13. The actual figures are as follows:

GUNBY'S SALARY

		Monthly	Yearly
1982	(JA. p. 108)	3080	36,960
1983	(JA. pp. 129, 351)	3203	38,436
1984	(JA. pp. 129, 351)	3363	40,356
1985	(JA. pp. 129, 350)	3531	42,372
1986	(JA. p. 129)	3708	44,496

tion are the facts that: (1) Gunby had received a higher evaluation in November 1981, than Hager had received in March 1982; and (2) that Gunby's ratings were well above average.

Finally, Penelectric has made certain submissions in support of its (alternative) contention that, even if Gunby is entitled to back pay, it should not have exceeded $8,062. Hager received an increase of 5% on December 1, 1982 when he became Manager — Employment/EEO/AA. Penelectric maintains that had Gunby received that position he would have received at most a similar 5% salary increase on December 1, 1982. Thereafter, Gunby actually received a 4% salary increase on January 1, 1983, and 5% increases on January 1, 1984, 1985, and 1986. Penelectric submits that if these percentage increases are applied to plaintiff's adjusted salary, the result is a salary difference of $8,062.

B. Discussion

A successful §1981/Title III [sic] plaintiff is entitled to back pay. The appropriate standard for the measurement of a back pay award is to take the difference between the actual wages earned and the wages the individual would have earned in the position that, but for discrimination, the individual would have attained. *E.E.O.C. v. Eazor Express Co.*, 499 F. Supp. 1377, 1388 (W.D. Pa. 1980), *aff'd mem.*, 659 F.2d 1066 (3d Cir. 1981). Penelectric asserts that Gunby is unable to satisfy

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(Continued)

HAGER'S SALARY

		Monthly	Yearly
1982	(JA, pp. 127, 341)	4185	50,220
1983	(JA, p. 341)	4352	52,224
1984	(JA, p. 130)	4526	54,312
1985	(JA, p. 130)	4775	57,300
1986	(JA, p. 130)	5014	60,168

this standard because there is no evidence of the amount Gunby would have earned had he received the Manager position. Gunby's grade 17 salary was well within the range of salaries available in grade 20. Therefore, in Penelectric's submission, Gunby did not prove that there would have been a difference in his salary had he received the job at issue.

We disagree. Rather, having in mind that the jury found Gunby entitled to a position that is 4 grade levels above his former position and that Gunby's performance evaluations were higher than Hager's, we believe that the jury, based on all the information available to it, could have determined that Gunby would have received the same amount that Hager received or some amount higher than Gunby was receiving at grade 17. Also relevant in this regard is the documentary evidence that in 1982 Gunby was at a salary level below his mid-point range, whereas Hager's $50,220 salary was over the mid-point of his salary range by almost $6,000 and substantially exceeded the mid-point each year thereafter.

The jury was free to award a reasonable amount that was within the company's own guidelines and fair under the circumstances, taking into account the qualification of the two employees and their performance. Cf. *Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir. 1984) (holding that the wrongdoer bore any risk of the uncertainty of the aggrieved plaintiff's award). As even a quick glance at the salary data set forth at page 25 *supra* will demonstrate, the $22,000 [sic] awarded was easily deducible and plainly reasonable.

Alternatively, Penelectric argues that the proper measure of damages is the same *percentage* increases earned by Hager when he assumed the job sought by Gunby. Appellee's Br. at 23. According to Penelectric, these percentage increases would support a jury verdict of no more than $8,062. Penelectric maintains that the

jury erred when it awarded Gunby the difference between the amount Gunby earned and the amount Hager earned, because Hager entered the new job with a higher salary level than Gunby would have if he had been selected for the position. In essence, Penelectric asserted that the newly created job's salary should be viewed as a percentage increase over the prior salary of the employee who filled it, and not as the specific amount earned by Hager.

Gunby responds that the jury was not restricted to awarding the percentage increases asserted on appeal by Penelectric. Instead, the jury had extensive salary information before it, including Gunby's salary and Hager's salary at the time of the discriminatory conduct and in the succeeding periods, and documents demonstrating the high-, low-, and mid-point salary amounts for grade levels 16 to 20. Gunby asserts that the jury could reasonably have concluded that Gunby would have received a raise over and above the percentage increases Hager received as a result of the new position. We agree, and therefore will affirm the back pay award.

III. DAMAGES FOR EMOTIONAL DISTRESS

A. The Facts of Record

The only specific evidence relating to Gunby's emotional distress resulting from his treatment by Penelectric related to being passed over for the job in Altoona. On direct examination, Gunby testified that he told Gallatin that "I had been done wrong" and that "I had been treated unfairly." Gunby also testified that he felt he "had been treated unjustly and that [he] was going to contest [the successful applicant's] qualifications." J.A. at 115-16. Additionally, Gallatin on direct examination testified that Gunby was "very upset" when informed of Penelectric's decision not to interview him for the Altoona position. Gunby, however, offered no specific

evidence of emotional distress related to his being passed over for the managerial job that went to Hager.

B. Discussion

As noted above, the jury awarded Gunby $15,000 damages for emotional distress and humiliation resulting from Penelectric's actions. General compensatory damages are available under §1981, *see Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 263 (8th Cir. 1985), and such damages may include compensation for emotional pain and suffering. *See Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984); *Williams v. Trans-World Airlines*, 660 F.2d 1267, 1272 (8th Cir. 1981). The plaintiff must present evidence of actual injury, however, before recovering compensatory damages for mental distress. *See Carey v. Piphus*, 435 U.S. 247 (1978) (compensatory damages recoverable in §1983 actions); *Spence v. Board of Education of Christina School District*, 806 F.2d 1198, 1200 (3d Cir. 1986) (emotional distress damages may not be presumed in first amendment action); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1313 (7th Cir. 1985) ("competent evidence" must support award for compensatory damages in §1981 action); *Erebia v. Chrysler Plastics Products Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) ("there must be sufficient evidence to support the award"); *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983) (damages for mental anguish awardable where supported by evidence including sleeplessness, anxiety, embarrassment, and depression).

Penelectric maintains that Gunby introduced no evidence of emotional distress. Further, Penelectric argues that Gunby was unaware that the new position was being created and, thus, that his rejection could not have caused him mental anguish. We agree with the

contention that Gunby presented no evidence upon which the jury could reasonably conclude that he had suffered emotional distress as a result of being denied the position of new Manager — Employment/EEO/AA. Gunby urges us to assume that the jury could have inferred that he was just as humiliated by not receiving the Manager job as by not receiving the Altoona job. He analogizes this case to the defamation cases and suggests that the declaration of inferiority implicit in Gunby's being passed over and the concomitant adverse effect on his employment record justify *per se* treatment. Finally, Gunby argues that we should rely on *Williams v. Trans-World Airlines*, 660 F.2d 1267 (8th Cir. 1981), *Smith v. Anchor Building Corp.*, 536 F.2d 231 (8th Cir. 1976), and *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) as support for allowing the jury to infer emotional distress from the circumstances.

We decline Gunby's invitation to presume damages as though this case involved defamation rather than employment discrimination. The justifications that support presumed damages in defamation cases do not apply in §1981 and Title VII cases. Damages do not follow of course in §1981 and Title VII cases and are easier to prove when they do. *Cf. Carey v. Piphus*, 435 U.S. 247, 264 (1978) ("although mental and emotional distress caused by the denial of procedural due process itself is compensable under §1983 . . . neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused"). Although it is necessary in §1981 and Title VII cases that compensatory damages be provided, speculative damages will not be awarded. "Courts have allowed recovery under Section 1981 for emotional distress, *but there must be sufficient evidence to support the award.*" *Erebia*, 772 F.2d at 1259 (emphasis added). The cases cited by Gunby all involved direct and substantial evidence of humiliation or emotional injury. *See, e.g., Block*,

712 F.2d at 1245 (plaintiff testified that she was unable to obtain employment for thirteen months, that she had to borrow money from relatives to sustain her family, that as a result of her financial difficulties she suffered sleeplessness, anxiety, embarrassment and depression); *Smith*, 536 F.2d at 236 (plaintiff's testimony that she was "embarrassed" and "really hurt and humiliated" supported claim [sic] emotional distress damages); *Williams*, 660 F.2d at 1272 (plaintiff's testimony regarding mental distress adequate to support damage award where found by the district court to be credible). In *Seaton v. Sky Realty Co.*, although the Court of Appeals for the Seventh Circuit suggested in dictum that humiliation could be "inferred from the circumstances," its affirmance of emotional distress damages was supported by testimony "that the plaintiff . . . suffered great embarrassment because of the action of the defendants." 491 F.2d at 636. In contrast, there is no evidence of Gunby's emotional distress about the new Manager — Employment/EEO/AA job in the record. Because Gunby presented no evidence that he suffered any emotional distress as a result of the loss of the level 20 job, the verdict for emotional distress must be set aside.

IV. ADEQUACY OF EQUITABLE RELIEF

The district court heard the Title VII case without a jury but made no independent findings, considering itself bound by the findings of the jury.[14] It therefore

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14. The district court cited Lincoln v. Board of Regents of the University System of Georgia, 697 F.2d 928, 934 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983) and Sisco v. J.S. Alberici Construction Co., 655 F.2d 146, 151 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982) for the proposition that the jury's §1981 determination is preclusive as to the plaintiff's Title VII claim. We note that the weight of authority supports this position. *See* Garza v. City of Omaha, 814 F.2d 553 (8th Cir. 1987); King v. Alco Controls Div. of Emerson Electric Co., 746 F.2d 1331 (8th Cir. 1984); Goodwin v. Circuit Court, 729 F.2d 541, 549 n.11 (8th Cir.), *cert. denied sub.*

proceeded to a determination of appropriate equitable relief.

Title VII provides broad equitable discretion, which courts must exercise " 'in light of the large objectives of the Act.' " *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 226 (1982) (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)). The primary objective of Title VII is the elimination of discrimination in the workplace. A central purpose of Title VII relief is "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albermarle Paper Co.*, 422 U.S. at 418, and to restore the plaintiff as fully as possible to the position he otherwise would have been in absent discrimination. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976); *Gurmankin v. Costanzo*, 626 F.2d 1115 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (age discrimination).

The district court obviously wrestled with the question of relief. It resolved its doubts by making the following conclusions of law:

> 2. It would be equitable, under the circumstances of this case, to enjoin defendant from engaging in any employment practice that discriminates against the plaintiff because of his race.
>
> 3. Under the circumstances of this case, it would not equitable [sic] to upgrade plaintiff's present title and position, which is a Grade Level 16 position, to a Grade Level 20 position and title with corresponding benefits and privileges, because all such similar positions within the defendant's company are Grade Level 16 positions.

J.A. at 383.

(Continued)
nom. Corrigan v. Goodwin, 469 U.S. 828 (1984). Because it is not in dispute, however, we need not reach it here.

Although the district court's statement in paragraph 3 is somewhat cryptic, we believe that it was troubled by the inherent difficulty in fashioning equitable relief imposed by Penelectric's personnel system. As discussed *supra*, Penelectric employees hold positions according to a 20 level structure. Each grade level corresponds to a salary range, with a minimum, maximum and median. These salary ranges are not mutually exclusive; they overlap. An order to upgrade a Penelectric employee to level 20 would be to give a promotion without knowing exactly what that amounts to. The problem is complicated by the fact that Gunby already makes what could be a grade level 20 salary, albeit a low one.

Penelectric argues that the law is clear that Congress has vested the fashioning of appropriate remedies in the sound equitable discretion of the district court, which is in a better position than an appellate court to determine the equitable relief necessary. Gunby rejoins by pointing out that this discretion must be exercised with purpose and direction. In exercising its discretion to determine proper relief, the district court must adhere to the dictates of Title VII. *See Albermarle Paper Co.*, 422 U.S. at 416.[15] We agree.

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15. Although this relief presumptively takes the form of back pay, it is not limited to back pay. For example, "front pay," a monetary award ending on the date the plaintiff regains his position lost because of the discrimination rather than ending on the date of the order granting relief, may also be granted. *See* James v. Stockham Valves & Fittings Co., 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). Class-based retroactive seniority was ordered by the Supreme Court in *Franks*, 424 U.S. at 779. Retroactive promotion may be ordered if the district court finds that the plaintiff "would have attained that position but for the defendant's unlawful employment practices." Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977) (retroactive promotion remanded where the district court did not make such finding). A grant of tenure was ordered by this court in Kunda v. Muhlenberg College, 621 F.2d 532, 549 (3d Cir. 1980), predicated upon the plaintiff's completion of a required masters degree.

In *Franks v. Bowman Transportation Co.*, the Supreme Court held that the denial of seniority relief to victims of illegal race discrimination is permissible only for reasons that "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.' " 424 U.S. at 771 (quoting *Albermarle Paper*, 422 U.S. at 421). In light of *Franks* we must review the district court's exercise of discretion in terms of its effect on Title VII's objective of making the plaintiff whole and uphold that exercise only if the denial of relief does not frustrate this objective.

In our view, the district court's grant of relief in this case fails to make Gunby whole for the injuries he suffered as a result of Penelectric's unlawful discrimination. A grade level 20 position may carry with it a significant salary boost from a grade level 16 position, although, as noted below, the salary ranges overlap. A grade level 20 position also carries with it additional insurance benefits and other benefits such as better surroundings, accommodations and prestige.

Gunby does not seek to have Hager removed from his position. In a post-trial motion to reconsider relief, Gunby presented alternative remedies that the court could have utilized to fashion an effective and adequate Title VII relief. These alternative remedies could have included the future promotion of Gunby to a similar grade level 20 position and a raise in salary equal to that of a grade level 20 position until such time as a grade level position for which he is qualified becomes available.[16] The district court, however, simply denied

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16. Gunby's proposal is quite specific:
Since the evidence indicated that the staff position of Manager—Equal Employment Opportunity and Affirmative Action as of January 1, 1983, carried with it, as a job level 20, a minimum salary of $37,319, which was lower than the maximum salary range for a level 16 job, the court could have ordered an increase in Gunby's salary to

relief without considering these remedies, and Gunby appeals the denial.

As we have already suggested, the trier of fact could make a determination as to what Gunby's salary would likely have been by considering factors such as his performance evaluations, where he already was within grade and similar information with respect to Hager. Since such an alternative remedy would be the only way to make Gunby whole in light of the verdicts, it is necessary that we remand to the district court for further findings (and further evidence if necessary) on Penelectric's salary structure and where Gunby would likely have fit within it had he been awarded the grade level 20 position.[17]

(Continued)

$43,879, the maximum salary level for a level 16 until such time as a level 20 job for which he was qualified was available. J.A. at 366.

17. We note that the court in Carter v. Community Action Agency, 625 F. Supp. 199 (M.D. Ala. 1985) fashioned an alternative remedy where an innocent employee had filled the position the plaintiff was denied because of race discrimination. The court ordered the employer to place the plaintiff in a position with salary and responsibilities comparable to her former position, or, in the event no such position was available, the court ordered that the plaintiff be awarded front pay.

Interim changes within the company may also suggest other, similar, options.

V. CONCLUSION

For the foregoing reasons, we will affirm the jury's award of back pay and reverse the award of emotional distress damages. Because we hold that Title VII requires "make whole" relief, we will vacate the district court's equitable relief order prohibiting future discrimination against Gunby and remand for further findings, development of the record and an order granting full equitable relief.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CHARLES GUNBY, JR., *Plaintiff,*	:	
vs.	:	Civil Action No. 84-3009
PENNSYLVANIA ELECTRIC COMPANY, *Defendant.*	:	

FINDINGS OF FACT

1. Plaintiff is a black male adult.

2. Defendant is an employer engaged in a business affecting interstate commerce that employed more than 15 persons at all relevant times.

3. Plaintiff has been continuously employed by defendant since October, 1973.

4. On July 19, 1983, plaintiff filed a timely charge of race discrimination with the United States Equal Employment Opportunity Commission (EEOC), which deferred the charge to the Pennsylvania Human Relations Commission (PHRC), pursuant to the work sharing agreement between the EEOC and the PHRC.

5. Plaintiff filed the complaint in the instant action on December 17, 1984.

6. Plaintiff's current position with defendant is Supervisor-Division Personnel Services-Corporate, which is a Grade Level 16 position.

7. In his Title VII claim, plaintiff asserts that the defendant did not give him the position of Manager-Employment/Equal Employment Opportunity Affirmative Action (the Manager position) because of his race.

8. This Court makes no findings of fact as to the issue of the liability of the defendant on plaintiff's Title VII claim because the jury has already determined liability with respect to plaintiff's §1981 claim concerning the Manager position, and the jury's determination of that issue is *res judicata* as to plaintiff's Title VII claim. *See Lincoln v. Board of Regents of the University System of Georgia*, 697 F.2d 928, 934 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983); *see also Sisco v. J.S. Alberici Construction Co., Inc.*, 655 F.2d 146, 151 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. §1331 and 42 U.S.C. §§1981 and 2000e-5.

2. It would be equitable, under the circumstances of this case, to enjoin defendant from engaging in any employment practice that discriminates against the plaintiff because of his race.

3. Under the circumstances of this case, it would not be equitable to upgrade plaintiff's present title and position, which is a Grade Level 16 position, to a Grade Level 20 position and title with corresponding benefits and privileges, because all such similar positions within the defendant's company are Grade Level 16 positions.

4. Under the circumstances of this case, it would not be equitable to remove plaintiff's Employee Performance Evaluation forms dated October 20, 1982 and October, 1984, from his personnel file because there is no evidence that these forms were improperly prepared or contain improper information.

Date: 10/27/86 /s/ Alan N. Bloch

United States District Judge

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CHARLES GUNBY, JR., *Plaintiff,*	:	
vs.	:	Civil Action No. 84-3009
PENNSYLVANIA ELECTRIC COMPANY, *Defendant.*	:	

JUDGMENT ORDER

AND NOW, this 27*th* day of *October, 1986,* IT IS HEREBY ORDERED that judgment be, and hereby is, entered in favor of plaintiff and against defendant with respect to plaintiff's Title VII claim. IT IS FURTHER ORDERED that defendant is hereby enjoined from engaging in any employment practice that discriminates against the plaintiff because of his race.

Judgment having been entered on plaintiff's §1981 claims on October 22, 1986, the Clerk of Court is ordered to enter final judgment in the above captioned case.

/s/ Alan N. Bloch
United States District Judge

cc: Stanley M. Stein, Esquire
428 Boulevard of the Allies, Pittsburgh, PA 15219

Joseph E. Schmitt, Esquire
125 First Avenue, Pittsburgh, PA 15222

Anthony A. DeSabato, Esquire
1550 United Engineers Building,
30 South 17th Street
Philadelphia, PA 19103

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CHARLES GUNBY, JR., *Plaintiff,*	:	
vs.	:	Civil Action No. 84-3009
PENNSYLVANIA ELECTRIC COMPANY, *Defendant.*	:	

ORDER

AND NOW, this *6th* day of *November, 1986*, upon consideration of Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, or Remittitur filed in the above captioned matter on October 30, 1986,

IT IS HEREBY ORDERED that said Motion is DENIED.

/s/ Alan N. Bloch
United States District Judge

cc: Stanley M. Stein, Esquire
428 Boulevard of the Allies, Pittsburgh, PA 15219

Joseph E. Schmitt, Esquire
125 First Avenue, Pittsburgh, PA 15222

Anthony A. DeSabato, Esquire
1550 United Engineers Building,
30 South 17th Street
Philadelphia, PA 19103

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CHARLES GUNBY, JR., *Plaintiff,*	:	
vs.	:	Civil Action No. 84-3009
PENNSYLVANIA ELECTRIC COMPANY, *Defendant.*	:	

ORDER

AND NOW, this *17th* day of *November, 1986*, upon consideration of Plaintiff's Motion to Reconsider Order of relief filed in the above captioned matter on November 17, 1986,

IT IS HEREBY ORDERED that said Motion is DENIED.

/s/ Alan N. Bloch
United States District Judge

cc: Stanley M. Stein, Esquire
428 Boulevard of the Allies, Pittsburgh, PA 15219

Anthony A. DeSabato, Esquire
1550 United Engineers Building,
30 South 17th Street
Philadelphia, PA 19103

Joseph E. Schmitt, Esquire
125 First Avenue, Pittsburgh, PA 15222

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CHARLES GUNBY, JR., *Plaintiff,*	:	
vs.	:	Civil Action No. 84-3009
PENNSYLVANIA ELECTRIC COMPANY, *Defendant.*	:	

ORDER

AND NOW, this *23rd* day of *May, 1986*, upon consideration of Defendant's Motion for Partial Summary Judgment filed in the above captioned matter on December 16, 1985,

IT IS HEREBY ORDERED that Defendant's Motion is DENIED, for the reasons set forth by the United States Court of Appeals for the Third Circuit in *Al-Khazraji v. St. Francis College*, 784 F.2d 505, 511-14 (3d Cir. 1986).

/s/ Alan N. Bloch
United States District Judge

cc: Stanley M. Stein, Esquire
428 Boulevard of the Allies, Pittsburgh, PA 15219

Joseph E. Schmitt, Esquire
125 First Avenue, Pittsburgh, PA 15222

Anthony A. DeSabato, Esquire
1550 United Engineers Building,
30 South 17th Street
Philadelphia, PA 19103

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CHARLES GUNBY, JR., *Plaintiff,*	:	
vs.	:	Civil Action No. 84-3009
PENNSYLVANIA ELECTRIC COMPANY, *Defendant.*	:	

MEMORANDUM OPINION

BLOCH, District J.

Plaintiff Charles Gunby, Jr. (Gunby) filed this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* (Title VII), and the Civil Rights Act of 1866, 42 U.S.C. §1981 (§1981), alleging that the defendant Pennsylvania Electric Company discriminated against him by failing to promote or transfer him to a number of positions within the Company. Presently before the Court is defendant's motion for partial summary judgment with respect to Counts 2 through 6 of plaintiff's complaint. Further, defendant moves to strike plaintiff's demand for a jury trial under Title VII and to strike Count 7, since damages for mental anguish and emotional distress are not recoverable under Title VII.[1] For the reasons that follow, defendant's motion is granted in part and denied in part.

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1. Count 1 of plaintiff's complaint alleges a cause of action under Title VII and §1981. Counts 2 through 6 allege a cause of action only under §1981. Count 7, which was misnumbered as Count 6, seeks damages for mental anguish and emotional distress.

I. Title VII as Plaintiff's Exclusive Remedy

Defendant maintains that Title VII provides the exclusive remedy for discriminatory employment practices that allegedly violate rights set forth in Title VII. In support, defendant cites the Court to *Rivera v. City of Witchita Falls*, 665 F.2d 531, 543 n. 4 (5th Cir. 1982), where the Fifth Circuit held that consideration of §1981 and §1983 claims, as alternative remedies, is only necessary if their violation can be made out on different grounds from those available under Title VII. The Fifth Circuit's opinion offers no explanation or citation for this proposition, and this Court finds the Supreme Court's decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), instructive on this point. In *Johnson*, the Supreme Court held that Title VII is not the exclusive remedy for claims of employment discrimination in the private sector and that exhaustion of administrative remedies under Title VII is not a prerequisite to an action under §1981. *Id.* at 460-61. The Court's holding was derived primarily from an examination of the legislative history of Title VII, which demonstrated that Congress intended to allow aggrieved persons to independently pursue their rights under both Title VII and other applicable state and federal statutes. The *Johnson* Court noted that:

> Despite Title VII's range and design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief.

Id. at 459.

Further, in *Brown v. GSA*, 425 U.S. 820 (1976), the Supreme Court held that Title VII is the exclusive remedy for *federal* employees. In arriving at this conclusion, *Brown* makes clear that explicit legislative intent is controlling. Thus, the Supreme Court noted that in the

legislative history of the relevant amendments to Title VII, Congress was silent regarding the exclusivity of remedies for federal employees permitting the Court to infer that Congress intended to preempt all non-Title VII remedies. In holding Title VII to be the exclusive remedy for federal employment discrimination, the Court distinguished *Johnson* noting as follows:

> The petitioner relies upon our decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon the explicit legislative history of the 1964 Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." Congress made clear "that the remedies available to the individual under Title VII are co-extensive with the indivi[i]dual's [sic] right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §1981, and that the two procedures augment each other and are not mutually exclusive." *See also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 415-417 (1968). There is no such legislative history behind the 1972 amendments. Indeed, as indicated above, the congressional understanding was precisely to the contrary.

Id. at 833-34 (citations omitted) (emphasis in original).[2]

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2. The *Johnson* decision was reaffirmed by the Supreme Court in *Great American Savings & Loan Assn. v. Novotny*, 442 U.S. 366 (1979) (plaintiff cannot redress a violation of Title VII by means of 42 U.S.C. §1985).

Even before *Johnson*, the Third Circuit, in *Young v. International Telephone and Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971), held that nothing in Title VII expressedly or impliedly imposes any jurisdictional barrier to a suit brought under §1981. Plaintiff has an independent remedy under §1981 without respect to exhaustion under Title VII.[3] *See Croker v. Boeing Co.*, 662 F.2d 975, 989 (3d Cir. 1981) (en banc) ("we reject the . . . contention that section 1981 liability is coextensive with liability under Title VII. The remedies provided under the two statutes are 'separate, distinct, and independent.' "); *Storey v. Board of Regents*, 600 F. Supp.

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3. Defendant also has cited the Court to *Tafoya v. Adams*, 612 F. Supp. 1097 (D.C. Col. 1985), where the Court held that it is inconsistent with the general statutory scheme of Title VII to permit consideration of Title VII claims and §1981 and §1983 claims in the same suit, unless the non-Title VII claims are independent from rights guaranteed under Title VII. The district court in that case was concerned, *inter alia*, that litigants would use §1981 to bypass Title VII's administrative procedures and to bring time-barred claims. To the extent that the district court concluded that plaintiffs should not be permitted to "bypass" the procedure required under Title VII merely by including a cause of action under §1981, the Third Circuit noted as follows in *Gooding v. Warner-Lampert Co.*, 744 F.2d 354, 359 (3d Cir, 1984): "[t]he district court in its order of January 4, 1983, also dismissed appellant's §1981 claim, stating that a plaintiff should not be able to bypass Title VII procedures by including a cause of action under 42 U.S.C. §1981. Warner-Lampert virtually concedes this was error. The avenues of relief available under Title VII and §1981 are independent. The filing of a Title VII charge and resort to Title VII's administrative machinery are not a prerequisite for maintaining a §1981 suit." (*citing Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 460). Further, district courts in this Circuit have considered §1981 claims, where the plaintiff's Title VII claims were time barred. *See Bey v. Schneider Sheetmetal*, 603 F.Supp. 450, 452 (W.D. Pa. 1985); *Johnson v. Host Enterprises, Inc.*, 470 F.Supp. 381, 383-84 (E.D. Pa. 1979). The *Tafoya* Court also relied on *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984). Both *Day* and *Tafoya* are distinguishable in that they involved claims arising in *public* rather than private employment. Indeed, *Day* distinguished *Johnson* on that basis.

838 (W.D. Wisc. 1985) (Title VII is not plaintiff's exclusive remedy). Accordingly, defendant's motion for partial summary judgment on Counts 2 through 6 of plaintiff's complaint is denied.

II. Motion to Strike Demand for Jury Trial

Defendant moves to strike plaintiff's demand for a jury trial on Gunby's Title VII claim. Since there is no right to a trial by jury in cases arising under Title VII, defendant's motion is granted. *See Lehman v. Nakshiau*, 453 U.S. 156, 164 (1981).[4]

III. Mental Anguish and Emotional Distress

Defendant has moved to dismiss Count 7 since Title VII only permits "equitable" relief. 42. U.S.C. §2000e-5(g). The circuit courts that have considered this issue have held that plaintiff cannot recover damages for mental suffering or emotional distress under Title VII. *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 946 n. 12 (D.C. Cir. 1981); *Shah v. Mount Zion Hospital and Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981); *De Grace v. Rumsfeld*, 614 F.2d 796, 808 (1st Cir. 1980); *Garner v. Giarrusso*, 571 F.2d 1330, 1339 (5th Cir. 1978). Compensatory damages for mental anguish, as well as punitive damages, are recoverable in appropriate circumstances under §1981. *Runyan v. McCrary*, 427 U.S. 160, 170 (1975); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 460; *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 (8th Cir. 1984); *Thomas v. Resort*

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4. This issue was initially raised at the status conference before this Court on April 2, 1985. At that time, the Court held that the case would be tried non-jury as to plaintiff's Title VII claim and jury as to plaintiff's §1981 claim. *See* docket entry No. 4. There is a right to a jury trial under §1981 on all claims for legal relief. *Setser v. Novack Inc., Co.*, 638 F.2d 1137, 1140 (5th Cir.), *cert. denied*, 454 U.S. 1064 (1981).

Health Related Facility, 539 F. Supp. 630, 633-34 (E.D.N.Y. 1982).[5] Accordingly, insofar as plaintiff's complaint seeks to recover damages for emotional distress and mental anguish under Title VII, defendant's motion is granted.

An appropriate Order will be issued.

Date: 11/19/85 /s/ Alan N. Bloch
United States District Judge

cc: Counsel of record.

5. Defendant's motion is somewhat unclear regarding whether it seeks to strike all references to compensatory and punitive damages that plaintiff may be seeking under Title VII. Although defendant's motion only seeks to dismiss Count 7, defendant states that compensatory and punitive damages are not recoverable under Title VII. In *Richerson v. Jones*, 551 F.2d 918, 926-27 (3d Cir. 1977), the Third Circuit held that punitive damages are not recoverable under Title VII. Further, in *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 96 (3d Cir. 1973), the Third Circuit stated that plaintiffs who were denied pension benefits because of sex discrimination could recover "compensatory damages" under Title VII. In *Richerson v. Jones, supra*, the Third Circuit clarified that while *Rosen* was correct in concluding that wrongfully withheld benefits could be recovered under Title VII, that recovery is actually a form of equitable restitution, rather than a form of legal damages. 551 F.2d at 926 n. 13.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHARLES GUNBY, JR., Plaintiff,	:	
v.	:	Civil Action No. 84-3009
PENNSYLVANIA ELECTRIC COMPANY, Defendant.	:	

ORDER

AND NOW, this *19th* day of *November, 1985*, upon consideration of Defendant's Motion for Partial Summary Judgment filed in the above captioned matter on August 16, 1985,

IT IS HEREBY ORDERED that said Motion is GRANTED in part and DENIED in part, to wit:

1. GRANTED, insofar as defendant seeks to strike plaintiff's demand for a jury trial on plaintiff's Title VII claim;

2. GRANTED, insofar as defendant seeks to strike plaintiff's request for emotional suffering and mental anguish with respect to plaintiff's Title VII claim; and

3. DENIED, in all other respects.

/s/ Alan N. Bloch
United States District Judge

cc: Samuel Sims, Esquire
19 West 5th Street, Chester, PA 19013

Verdell Dean, Esquire
Suite 1609, Allegheny Building, Pittsburgh, PA 15219

Joseph E. Schmitt, Esquire
125 First Avenue, Pittsburgh, PA 15222

Anthony A. DeSabato, Esquire
1550 United Engineers Building, 30 South 17th Street
Philadelphia, PA 19103

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3707 & 86-3723

CHARLES GUNBY, JR.,
Appellant in No. 86-3707

vs.

PENNSYLVANIA ELECTRIC COMPANY,
Appellant in No. 86-3723

(D.C. Civil No. 84-3009)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA — Pittsburgh

Present: HIGGINBOTHAM, BECKER, *Circuit Judges* and
BARRY, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania — Pittsburgh and was argued by counsel July 6, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered October 27, 1986, November 6, 1986 and November 17, 1986, be, and the same are hereby affirmed insofar as the jury's award of back pay and reversed insofar as the award of emotional distress damages. It is further ordered and adjudged that the equitable relief order prohibiting future discrimination against Gunby is vacated and the cause remanded to the

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* Honorable Maryanne Trump Barry, U.S. District Judge for the District of New Jersey, sitting by designation.

said District Court for further findings, development of the record and an order granting full and equitable relief.

ATTEST: /s/ Sally Mrvos
Clerk

February 4, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3707 & 86-3723

CHARLES GUNBY, JR.,
Appellant in No. 86-3707

v.

PENNSYLVANIA ELECTRIC COMPANY,
Appellant in No. 86-3723

SUR PETITION FOR REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, *Circuit Judges*, and BARRY, *District Judge*.*

The petition for rehearing filed by appellant Pennsylvania Electric Company in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is defined.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

Dated: March 4, 1988

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* The Honorable Maryanne Trump Barry, U.S. District Judge for the District of New Jersey, sitting by designation, as to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3707 & 86-3723

CHARLES GUNBY, JR.,
Appellant in No. 86-3707

vs.

PENNSYLVANIA ELECTRIC COMPANY,
Appellant in No. 86-3723

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 11, 1988.

/s/ Edward R. Becker
Circuit Judge

Dated: March 18, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3707 & 86-3723

CHARLES GUNBY, JR.,
Appellant in No. 86-3707

vs.

PENNSYLVANIA ELECTRIC COMPANY,
Appellant in No. 86-3723

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until May 11, 1988.

/s/ Edward R. Becker
Circuit Judge

Dated: April 8, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-3707 & 86-3723

CHARLES GUNBY, JR.,
Appellant in No. 86-3707

vs.

PENNSYLVANIA ELECTRIC COMPANY,
Appellant in No. 86-3723

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until May 25, 1988.

/s/ Edward R. Becker
Circuit Judge

Dated: May 10, 1988